

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER 01-0065
RESPONSIBLE OFFICER
SALES TAX and WITHHOLDING TAX
For Tax Periods: 1993-1999

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning specific issues.

Issues

Sales and Withholding Tax-Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-3-4-8 (f), IC 6-8.1-5-1 (b), Indiana Department of Revenue v. Safayan, 654 N.E. 2nd 270 (Ind.1995) at page 273:.

The taxpayer protests the assessment of responsible officer liability for unpaid corporate sales and withholding taxes.

Statement of Facts

The taxpayer was a shareholder and secretary-treasurer of a corporation that did not remit the proper amount of sales and withholding taxes to Indiana for the period December, 1993 through November 30, 1999. The taxpayer was personally assessed for the taxes. The taxpayer protested these assessments and a hearing was held. More facts will be provided as necessary.

Sales and Withholding Tax-Responsible Officer Liability

Discussion

The proposed sales tax liability was issued under authority of IC 6-2.5-9-3 that provides as follows:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and

(2) has a duty to remit state gross retail or use taxes to the department;
holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

The proposed withholding taxes were assessed against the taxpayer pursuant to IC 6-3-4-8(f), which provides that “In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest.”

Indiana Department of Revenue assessments are prima facie evidence that the taxes are owed by the Taxpayer who has the burden of proving that assessment is incorrect. IC 6-8.1-5-1 (b).

The seminal case concerning the personal liability of officers for corporate withholding and sales taxes is Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995). In that case, four investors started a restaurant. One couple, the Safayans, provided most of the capital for the restaurant. The other couple provided the knowledge and experience in the restaurant business. The Safayans delegated the day to day operations of the restaurant to the second couple. After withholding and sales taxes were not properly remitted to the state of Indiana, the Indiana Department of Revenue assessed those taxes, penalty and interest against Mrs. Safayan in her capacity as president of the corporation. The Court found at page 273 that “The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid.”

From the date of incorporation until January 28, 1994, the taxpayer was the secretary-treasurer of the corporation. As such, the taxpayer had control of all of the corporation’s financial records and final authority concerning the payment of any liability. Therefore, he had the statutory duty to see that all trust taxes were paid. All sales and withholding taxes due to the state while the taxpayer was actively the secretary-treasurer have been paid.

The taxpayer contends and has provided sufficient documentation that on January 28, 1994, the president of the corporation forcibly evicted the taxpayer from the corporate offices. At that time the president took over all responsibility for the operations of the corporation including all responsibility for the corporate finances. The taxpayer was no longer able to take any part in the corporate affairs. Since the taxpayer was unable to exercise any authority over the corporate operations, he sustained his burden in proving that he did not have the statutory duty to remit trust taxes due to the state after January 28, 1994.

Finding

The taxpayer’s protest is sustained.